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Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

AMERICAN NATIONAL MORTGAGE, INC.,)

Plaintiff and
Respondent,)

vs.

Case No.

JAY E. BOWEN and FRANCES D,
BOWEN, his wife,)

14473

Defendants and
Appellants.)

APPELLANTS' BRIEF

Appeal from the Judgment of the Third District
Court for Salt Lake County, Honorable Jay E. Banks,
Judge.

FILED *****

JUN 14 1976

Clerk, Supreme Court, Utah

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IN THE
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Plaintiff and
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Case No.

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BOWEN, his wife,)

14473

Defendants and
Appellants.)

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by the Plaintiff to obtain a judgment regarding property, compelling Defendants to accept a tender of performance and to deliver to Plaintiff a deed to said property together with a Title Insurance Policy.

DISPOSITION IN LOWER COURT

The District Court found that Plaintiff made a sufficient and proper tender of money owed Defendants, and entered Judgment against Plaintiff and in favor of Defendants in the amount of \$2,757.50.

RELIEF SOUGHT ON APPEAL

Appellants request this Court reverse the finding of the District Court that Plaintiff made a sufficient and proper tender. Appellants also request that this case be remanded and that Judgment be re-entered for the Defendants for damages awarded as agreed to by Stipulation between the parties; or in the event that this Court finds such Stipulation to be void as a matter of law, that Defendants be allowed to foreclose upon the property which is the subject of this action, or to avoid the Trial as to Mrs. Bowen as she did not sign the Stipulation.

STATEMENT OF FACTS

On December 7, 1972, Jay E. Bowen and Frances D. Bowen, his wife, were record owners of the property which is the subject of this law suit. On the above date they entered into a Uniform Real Estate Contract selling said property to American National Mortgage, Inc. An Addendum to the contract was drawn, setting out covenants to be performed prior to delivery of the deed.

On August 16, 1973, a Notice of Delinquency dated August 13, 1973 was duly served on Buyer, alleging non-performance of specific duties. Demand for payment of the balance due was made, said balance being past due as of June 1, 1973. Demand also was made for specific performance of duties agreed to by Buyer in the Addendum, together with attorney's fees and costs.

On September 21, 1973, Buyer was duly served with a Declaration of Forfeiture and Notice to Quit dated September 10, 1973, demanding Buyer to vacate and surrender possession of the property within five days after service.

Buyers response was to file suit, claiming compliance with the contract, and alleging non-compliance by Seller. Buyer sought, inter alia, an adjudication as to respective rights of Buyer and Seller, a preliminary injunction preventing foreclosure, and damages. A counterclaim and answer thereto was filed.

On December 3, 1975, the parties entered into a Stipulation as to damages based on the findings that the Court might make, and the matter came on to be heard on December 4, 1975, with Judgment entered for the Defendants, for a sum less than claimed and stipulated.

ARGUMENT

POINT I.

BASED UPON THE EVIDENCE, THE LOWER COURT WAS IN ERROR IN ITS FINDING THAT THE PLAINTIFF MADE A PROPER AND SUFFICIENT TENDER.

In its Findings of Fact, the District Court found:

6. That on June 5, 1973, Plaintiff met Defendant on the property in question and tendered him the full amount due under the contract, which amount was Two Thousand Seven Hundred Fifty Seven Dollars and Fifty Cents (\$2,757.50) which amount represented Three Thousand Dollars minus an amount equal to the value of the cars, which Defendant purchased back from Plaintiff pursuant to the addendum in the contract.
7. That thereafter, on June 13, 1973 Plaintiff paid to Security Title Company the amount of Twenty Four Hundred Fifty Dollars (\$2,450.00).

Under Conclusions of Law the Court stated: "1. That the Plaintiff made Defendant a sufficient and proper tender on June 5, 1973."

Under the Addendum to the contract the Plaintiff had agreed to pay Defendants the balance owing of \$3,000.00 less \$2.50 for each junk automobile repurchased by Defendants. This balance was to be paid by June 1, 1973. By actual count, 85 cars remained on the premises, to be relocated to a more convenient site

on the property by Plaintiff in order to facilitate removal by Defendant.

The Lower Court's Finding of Fact, paragraph six supra, based on Plaintiff's unsubstantiated testimony in Court is clearly in error. The evidence indicates that the Defendants sought to obtain the balance due by employing counsel. If, as the Lower Court found, Plaintiff made a sufficient and proper tender on June 5, 1973, it would have been redundant for Defendants to seek the aid of counsel in recovering monies past due shortly thereafter. In Defendants' Notice of Delinquency to Plaintiff, dated August 13, 1973, paragraph two, the sum of \$2,787.50 past due was set forth (\$3,000.00 less 85 cars at \$2.50 each).

It is also unusual that the Plaintiff would, after having his tender rejected as the Court found, place a less than full and proper amount into escrow about one week later, Defendants' very demand for the money by Notice of Delinquency rebuts the finding that Plaintiff made a proper and sufficient oral tender on June 5, 1973 as the Court found.

In order for the Lower Court's Conclusion of Law paragraph one supra to be correct, the Court must show that the full amount was "tendered" on June 5, 1973. The definition of "tender" is a definite offer to pay on the one hand and an "unqualified refusal" to accept on the other. Supreme Tent, Knights of Maccabees of the World v. Fisher, 90 E.E. 1044, 45 Ind App 419. There is no evidence of Defendants refusing to accept an oral offer of money, moreover, their eagerness to obtain the balance due is evidenced by the Notice of Delinquency

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sent to Plaintiff.

Evidence also indicates (Notice of Delinquency), that 12 to 14 cars remained on the property, which Defendants were unable to remove due to a condition which existed due to non-performance of the Plaintiff. Under the contract Defendants had no obligation to pay for that which they had not received, thereby hypothetically Defendant could have rightfully rejected a tender of \$3,000.00 less 85 x \$2.50 if such tender had been made. The Defendants had in fact been able to remove only about 71 or so of the cars.

In short, the facts tend more to indicate that a tender of the full amount due was probably never made, and the Court was in error in finding such tender.

POINT II.

THE AMOUNT PAID INTO ESCROW BY PLAINTIFF ON JUNE 13, 1974 WAS INSUFFICIENT AND NOT A VALID TENDER THEREBY PLACING PLAINTIFF IN BREACH AND REPUDIATING AND CONTROVERTING PLAINTIFF'S TESTIMONY OF A FULL TENDER ON JUNE 5.

The Court in its Conclusions of Law makes no finding as to the sum of \$2,450.00 paid into escrow by the Plaintiff. However, the Court does find: "3. That Security Title Company was a contemplated place at which Plaintiff could make tender." This finding seems moot in that the Court found that the amount owed Defendant was \$2,750.00. This amount the Court found Plaintiff orally offered to the Defendants on June 5, 1973. The Court should have found upon the evidence that the sum placed into escrow was the only tender made to the Defendants and that it was invalid.

Plaintiff reveals substantial inconsistency by his

plea of tender to a higher amount and his placing of a substantiated but lesser amount into escrow. Plaintiff's plea of tender of \$2,750.50 on June 5, 1973 is an admission of liability, therefore the placing of a lesser amount into escrow at a later date was insufficient and a breach of the contract.

Plaintiff's excuse for the lesser amount actually paid into escrow is that Defendants agreed to pay a survey charge. There is no evidence of this and the Court found none. A tender upon a condition for which there is no foundation in the contract is insufficient. A tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights. See Bohler v. Calloway, 267 U.S. 479, 696 L. Ed 745, 45 S. Ct 431; Bellamah v. Schnider, 68 N.M. 247, 360 P2d 656. Also a tender must be unconditional. If the party who tenders money adds a condition that the party who receives shall acknowledge no more is due, it will invalidate the tender. Thompkins v. Batie, 7 NW 747, 11 Neb 147; Shiland v. Loeb, 69 NYS 11, 12 58 App Div 565.

Also it is the duty of the debtor to make sure his tender is sufficient in amount. He acts at his peril and must see to it that his tender is sufficient in amount and any delinquency in amount is at his peril. Wood v. Howland, 127 Iowa 394, 101 NW 756; Greenwade v. Williams (Ky), 281 SW 2d 707. A tender must include everything to which the creditor is entitled, a tender of anything less is not a tender at all. Colby v. Reed, 99 U.S. 560, 25 L. Ed. 484; Duke v. Pugh, 218 N.C. 580, 11 SE 2d 868, 869; Bembridge v. Miller, 235 Ar 396, 385 P2d 1972.

POINT III.

THE LOWER COURT ERRED IN INTERPRETING THE STIPULATION ENTERED INTO BETWEEN THE PARTIES, THEREBY ENTERING A JUDGMENT FOR DEFENDANT WHICH WAS IN DIRECT CONFLICT WITH SAID STIPULATION.

The Stipulation sets forth the specific issues to be tried by the Court. Paragraph one reads:

1. Whether or not Brown made an offer for full tender, either written or oral on or before the date due. (Emphasis added).

The Stipulation sets forth several issues to be tried regarding a specific "purported tender." This "purported tender" is the act of placing \$2,450.00 into escrow by the Plaintiff on June 13, 1973 and is identified as such by the incorporation by reference of the Notice of Delinquency dated August 13, 1973. Paragraph seven of the Stipulation in part reads:

7. The following facts are, for the purpose of Trial, stipulated:
 - a. That the first objection to the purported tender was made, was August 13, 1973. (Emphasis added).

Paragraph two of Defendant's Notice of Delinquency dated August 13, 1973 reads in part:

. . . American National Mortgage has placed \$2,450.00 in escrow with Security Title Company. This amount is insufficient in light of the figures quoted.

Paragraph seven (d) of the Stipulation reads:

In the event that the Court finds the purported tender insufficient and the tenderer thereby liable for breach, the parties hereby stipulate to Judgment in the amount of \$4,750.00 inclusive of all costs, attorney's fees, etc. Judgment however will not be entered for at least one (1) month after trial. (Emphasis added)

It is clear that paragraph eight of the Stipulation refers to the purported tender as it stipulated the amount of \$2,450.00 owing if the Court finds the tender sufficient, or the amount of \$2,750.00 if the Court finds that Defendants waive their objections as to sufficiency. The Court never made any finding as to the sufficiency or waiving of objections of the purported tender.

The Court below was in error in finding that Plaintiff made a sufficient and proper tender on June 5, 1973 (Conclusions of Law, paragraph one). The parties stipulated that apart from the purported tender, findings would only be made as to tenders which may have been made on or before June 1, 1973. No other tender was contemplated by the parties. All other references to tender in the Stipulation refer only to the purported tender of depositing money into escrow on June 13, 1973. In accordance with the Stipulation, paragraph seven(d) or seven(e), the Court should have ruled on the validity of the purported tender. A "stipulation" is an agreement between attorneys respecting the conduct of legal proceedings. Dinwiddie v. Syler, 323 SW 2d 548, 551, 230 Ark 405.

Paragraph four, Conclusions of Law, states the amount owed Defendants. This figure, \$2,750.50 exceeds the sum placed in escrow and should be constructively read as to mean that the \$2,450.00 purported tender placed in escrow was insufficient and therefore invalid. In view of this, Judgment should have been entered for Defendants in the amount of \$4,750.00 as stipulated to and not \$2,750.00

CONCLUSION

Plaintiff was already in breach of the contract when he made a purported tender on June 13, 1973. The insufficiency of funds of \$2,450.00 paid into escrow compounded the breach and gave right to Defendants to terminate said contract and re-enter the property. The Court was in error when it found Plaintiff made a good and sufficient tender on June 5, 1973, because the amount claimed to have been tendered to the Defendant by the Plaintiff was \$300.00 more than he deposited which is better evidence of the tender that he actually made. The Court should have given Judgment in accordance with the Stipulation because the Plaintiff did not make a proper or sufficient tender. The Court should have granted Judgment in accordance with the Stipulation for the larger amount because the amount left at Security Title was insufficient in accordance with the Stipulation. In the alternative, the Court should set aside the Judgment at least as to Mrs. Bowen because she did not sign the Stipulation upon which the trial was conducted (although if the larger Judgment was entered, she would concur in that Judgment).